United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Signed

75-4214

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES G. RODMAN, Trustee of the
Estate of W. T. GRANT COMPANY,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF

THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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STATEMENT OF THE ISSUE PRESENTED

On the prior appeal of this case, this Court held that W. T. Grant Company could not report income from sales of merchandise under its coupon book credit plan on the installment method provided in Section 453 of the Internal Revenue Code of 1954 and the Treasury Regulations thereunder. The Court held that the Treasury Regulations required Grant to prove the extent to which such sales were paid for in installments, and that it had failed to maintain the records of sales that were necessary to supply such proof. The Court's decision required that the case be remanded for recomputation of Grant's tax deficiencies. On remand, the Tax Court denied Grant's motion for further trial, holding that Grant did not have available the proof required under this Court's decision to show its entitlement to installment reporting. The question presented on this appeal by Grant's trustee in bankruptcy is whether this Court's prior decision is so clearly incorrect that the Court's law of the case should be revised.

STATEMENT OF THE CASE

This appeal involves deficiencies in income tax of W. T. Grant Company for its taxable years 1964 and 1965 in the respective amounts of $2,773,786 and $3,336,501. (R. 64-65.)[1/] The deficiencies arise from the disallowance of Grant's reporting of income from sales under its coupon book credit plan on the installment method provided in Section 453 of the Internal Revenue Code of 1954. On its initial hearing of this case, the Tax Court (Judge Charles R. Simpson) held, inter alia, that income from such sales could be reported on the installment method. (R. 20-29; 58 T.C. 290 (1972).) The Commissioner appealed, and this Court reversed the Tax Court on the coupon plan issue in a unanimous opinion written by Judge Smith (R. 42-51) and officially reported at 483 F. 2d 1115 (1973). The case was remanded to the Tax Court for further proceedings consistent with this Court's opinion. (R. 52.)

Grant moved for further trial in the Tax Court, alleging that it was prepared to offer evidence which was consistent with this Court's opinion and which would qualify a high percentage of sales under its coupon plan for installment method treatment. (R. 53-57.) After hearings, the Tax Court (Judge Simpson) denied the motion, concluding that Grant's offer of proof was insufficient and that Grant did not have available the evidence required to satisfy Section 453 of the 1954 Code and the Treasury Regulations

1/ "R." references are to the separately bound record appendix.

as construed by this Court. (R. 58-59.) Grant's motion for reconsideration by the full Tax Court was also denied (R. 60-63), and decision determining the above deficiencies was entered on June 17, 1975. (R. 64-65.) Grant timely filed a notice of appeal on July 10, 1975. (R. 66.) Following Grant's adjudication in bankruptcy on April 13, 1976, the trustee in bankruptcy was substituted as party appellant by order of this Court. This Court has jurisdiction of this appeal by virtue of Section 7482 of the Internal Revenue Code.

The facts relevant to this appeal may be summarized as follows:

Prior to its adjudication in bankruptcy, W. T. Grant Company sold a wide variety of merchandise at retail in stores located throughout the United States. In the years here in issue, the company sold merchandise on three types of credit plans: (1) a traditional installment plan, referred to as the Special Purchase Installment Plan; (2) a typical revolving credit plan, referred to as the 30-day Option Plan; and (3) the Coupon Book Installment Plan, the plan involved here. (R. 8, 44.)

Under the Coupon Book Installment Plan, qualifying customers were permitted to purchase coupon books containing coupons redeemable at face value for merchandise in any Grant's store. Coupons appeared in various small denominations, and coupon books were issued with aggregate values of coupons ranging from $10 to $100.[2/]

2/ For example, a $50 book contained coupons in denominations ranging from $.25 to $2.00. (Ex. 6-F.)

A book of coupons could be paid for in full at the time of purchase, or the customer could execute a retail credit agreement agreeing to pay the face value of the book plus a time-price differential in fixed monthly installments. During the years 1964 and 1965, the number of such monthly installments ranged from a minimum of four to a maximum of eighteen.[3/] (R. 45-46.)

If the customer returned coupons or merchandise, the amount due for the coupon book and the time-price differential would be appropriately reduced. The customer could pay a monthly installment in advance, but such prepayment did not reduce the size of subsequent installment payments. If the customer paid the full balance of remaining installments in advance, however, the time-price differential was proportionately reduced. (R. 10-11, 46.)

For accounting purposes, Grant treated redemptions of coupons for merchandise, rather than the purchase of coupon books, as constituting sales. Coupon books were numbered, and were thereby identified with a particular retail credit agreement. Grant, however, did not identify and record the exchange of coupons for merchandise by each customer to whom a coupon book was issued. Thus, it had no means of correlating sales of merchandise under the coupon plan with installment payments received for books issued. Instead, each store kept daily totals of the dollar value of coupon books issued, coupons redeemed, and installment payments received. Grant's central accounting department aggregated these totals for all stores on a monthly basis. (R. 11-17, 46.)

3/ Monthly installment payments ranged between $5 and $10. (R. 10.)

On its returns for its taxable years 1964 and 1965, Grant reported its gain from sales of merchandise under the coupon plan on the installment method. By a series of computations, Grant reported as income that fraction of its total gross profit from the year's sales under the coupon plan that was proportionate to the fraction of the total price of such sales it had received in that year in the form of installment payments for coupon books.[4/] The Commissioner disallowed installment method treatment, determining that sales under the coupon plan failed to qualify under Section 453 of the 1954 Code and the Treasury Regulations. The Commissioner therefore required that Grant report the gain on its overall accrual method of accounting. (R. 11-14.) The Tax Court upheld Grant's installment method reporting for coupon plan sales, with two judges dissenting. (R. 33-40.) The court concluded that sales under the coupon plan fell within the "general concept of installment sales" (R. 25) under Section 453. (R. 20-29.)

On the Commissioner's appeal, this Court reversed the Tax Court. The Court concluded that whether coupon plan sales qualified for installment reporting depended upon whether they fell within the definition of "sale on the installment plan" in §1.453-2(b) of the Treasury Regulations, and not upon the interpretation of the statutory term "installment plan" the Tax Court

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4/ In actuality, Grant kept only one set of accounts in which it combined transactions under both the coupon plan and the Special Purchase Installment Plan. (R. 11.) Thus, it performed only a single computation to report sales under both plans on the installment basis.

had relied on. The Court determined that the coupon plan fell within §1.453-2(b)(2) of the Regulations' definitions, and that plans under that portion of the definition were typified by the absence of an installment contract for each item sold to the customer. The Court observed that §1.453-2(b)(2) therefore required proof that sales under such plans were actually paid for in installments, and that §1.453-2(d) of the Regulations embodied the procedures designed to furnish such proof. The Court held that Grant could not comply with these procedures, since they required an analysis of sales from a sampling of customer accounts and Grant had not maintained customer redemption records in connection with the coupon plan. It therefore concluded Grant was not entitled to installment method treatment. (R. 46-51.)

Following the denial of Grant's petition for rehearing en banc (Judge Hays dissenting), and its petition for a writ of certiorari (416 U.S. 937 (1974)), this Court issued its mandate directing further proceedings in the Tax Court not inconsistent with its opinion (R. 52). Grant filed a motion for further trial in the Tax Court before proceedings for recomputation of deficiencies were commenced. (R. 53-57.)[5/] Grant alleged that it could present evidence consisting of a statistical sampling of the rate of coupon redemptions which would establish "that 80% to 90% or more of coupon sales qualify for installment treatment under the standards prescribed by the Second Circuit" (R. 56). Grant conceded that it could not satisfy the proof procedures set forth

5/ Recomputations were necessary because the Commissioner had lost one other issue in the initial Tax Court proceedings (R. 29-32) which he did not raise on appeal.

in Regulations §1.453-2(d) (R. 59), but it asserted that its sampling was "consistent" with those Regulations (R. 56).[6/]

After two hearings, the Tax Court denied Grant's motion. It construed this Court's opinion as permitting installment sale treatment only if Grant could satisfy the provisions of Regulations §1.453-2(d), and observed that Grant had conceded it could not satisfy those provisions. The Tax Court thus concluded that further trial would be fruitless. (R. 58-59.) A decision determining deficiencies was entered on June 17, 1975 (R. 64-65), following the denial of Grant's motion for reconsideration by the full Tax Court of its motion for further trial (R. 60-62, 63).[7/] Grant then commenced the instant appeal. Following Grant's adjudication in bankruptcy, the trustee in bankruptcy was substituted as party appellant.[8/]

6/ Grant also asserted that, at a maximum, only those sales occurring during the last month of its taxable year should be disqualified from installment treatment. (R. 56.) This was the conclusion drawn in the dissenting opinion in the initial Tax Court proceeding (R. 39-40), and Grant asserted that this Court had adopted the same conclusion. (R. 56.)

7/ These deficiencies have already been assessed and collected. In July, 1975, the Internal Revenue Service set off the deficiencies and related interest against a tentative loss carryback allowance due Grant.

8/ The Government has filed a proof of claim in Grant's bankruptcy proceedings reflecting proposed tax deficiencies and interest for taxable years subsequent to those involved here. The proof of claim puts Grant's total liability at $84 million. Disallowance of installment method reporting for sales under the coupon plan in years subsequent to those involved here is one of the principal items of deficiency underlying the proof of claim.

SUMMARY OF ARGUMENT

The trustee in bankruptcy urges that this case concerns the types of installment sale plans other than traditional installment plans encompassed by the dealer installment sale regulations under Section 453 of the Internal Revenue Code. For him, this inquiry into types of "nontraditional" plans is determinative of the mode of proof the Regulations require to establish that sales under such plans qualify for installment method reporting. But the trustee's concentration on types of installment plans is misplaced, since the focus of the Regulations is on sales transacted under such plans. The Regulations make installment method treatment turn not on types of nontraditional plans under which sales are transacted, but on proof that specific sales under such plans possess the installment payment characteristics contemplated by Section 453. And it is on the question of proof that the trustee must fail in this case: whatever the merit of his analysis of the types of nontraditional plans the Regulations encompass, it is undisputed that Grant maintained no records of customer coupon redemptions (i.e., sales under the coupon plan), and the trustee therefore cannot show that any portion of sales under the coupon plan deserve tax deferral under Section 453.

On the prior appeal of this case, this Court determined that, as to installment plan sales other than traditional installment sales, §1.453-2(b)(2) of the Regulations makes installment method treatment contingent upon proof that sales actually involve multiple payments. The Court concluded that sales under the coupon plan must meet this standard of proof, and that the procedures in

Regulations §1.453-2(d) for "revolving credit plans" prescribed the mode of proof which coupon plan sales therefore must satisfy. Since those procedures require the selection of a sample of customer credit accounts and an analysis of sales charged to those accounts, and since Grant had maintained no records of coupon redemptions by customer (i.e., sales) under the coupon plan, the Court held that Grant could not report coupon plan sales on the installment basis.

The trustee argues, however, that Regulations §1.453-2(b)(2) encompasses nontraditional installment plans other than "revolving credit plans" as defined in §1.453-2(d)(1), and that the Regulations distinguish between revolving credit plans and such other nontraditional plans insofar as modes of proof are concerned. He contends that the proof procedures in §1.453-2(d) were designed for and apply only to "revolving credit plans," and that sales under other nontraditional plans may be shown to qualify as "sale[s] on the installment plan" under §1.453-2(b)(2) by any reasonable mode of statistical proof. He further contends that the coupon plan is not a "revolving credit plan," and thus that this Court erred on the prior appeal in requiring that coupon plans sales satisfy the sampling procedures embodied in §1.453-2(d) in order to be reported on the installment method.

We may concede for purposes of argument that §1.453-2(b)(2) encompasses nontraditional installment plans other than revolving credit plans. We may also concede that the coupon plan is one such nontraditional plan that is not a revolving credit plan. But

these concessions do not affect the outcome of this case, because they have no bearing upon the crucial issue here--the mode of proof the trustee must employ to prove that sales under the coupon plan qualify for installment method treatment.

Regulations §1.453-2(b)(2) defines a qualifying "sale on the installment plan" as a sale which (1) is contemplated to be paid for in installments, and (2) which is in fact paid for in installments. And the proof procedures in §1.453-2(d) test sales under revolving credit type plans to determine whether or not such sales possess the elements of this definition. Thus, the trustee errs in asserting that the proof procedures in §1.453-2(d) are specifically designed to deal with unique features of "revolving credit plans" defined in §1.453-2(d)(1). Those procedures were not designed to deal with attributes possessed only by revolving credit plans, but to identify sales transacted under such plans which lacked the installment payment characteristics necessary for Section 453 treatment.

Indeed, the §1.453-2(d) rules are aptly suited to analysis of sales under Grant's coupon plan. It is possible that at least some sales under the coupon plan consisted of merchandise the price of which was less than the required monthly installment payment, and sales of such merchandise would not be of the type the plan would contemplate to be paid for in installments. It is also possible that there were sales under the coupon plan which would have been contemplated to be paid for in installments, but which were in fact paid for in a single payment to avoid the predetermined time-price differential. Sales in both categories do not warrant

installment method treatment, and if the necessary records of customer redemptions had been kept, a proper analysis of a sample of customer accounts under the coupon plan could have identified such ineligible, one-payment sales.

Hence, the trustee's argument that the §1.453-2(d) proof procedures do not "fit" the coupon plan is accurate only in retrospect: at least some sales under the coupon plan are likely to have been ineligible for installment method treatment for the same reasons that cause the ineligibility of sales under revolving credit plans, and the rules in §1.453-2(d) are fully suited to identify such coupon plan sales. The rules cannot now be applied only because Grant failed to maintain records of customer coupon redemptions. Indeed, since sales under the coupon plan may be ineligible for Section 453 treatment for the same reasons as sales under revolving credit plans may be, it would be anomalous if coupon plans were to be subjected to any less stringent mode of proof than sales under revolving plans. But since the trustee has available no records of sales under the coupon plan, that is necessarily what he seeks permission to do here. Moreover, while the trustee speculates that the rules in §1.453-2(d) may not "fit" other types of nontraditional plans than revolving credit plans, such speculation is academic here. Those rules could have been applied to sales under the coupon plan had Grant kept the necessary records of sales.

The trustee also argues that it would have been burdensome for Grant to have maintained such records, but the contention is

of slight assistance to the trustee unless he can establish that the Regulations allow an alternative and less burdensome mode of proof than that prescribed in §1.453-2(d). That he cannot do--despite his efforts to have this Court revise the Regulations to read otherwise. The Regulations permit the sampling required by §1.453-2(d)--or a sale-by-sale analysis in literal compliance with §1.453-2(b)(2)--as the only modes of establishing that sales under nontraditional installment plans qualify for Section 453 treatment. The trustee does argue that §1.453-2(c) allows a dealer using a nontraditional plan which is not a revolving credit plan to establish a percentage of multiple payment sales using any reasonable method of proof permitting "accurate computation," but the contention is without merit. The portion of §1.453-2(c) on which the trustee relies is merely a rule of record retention--not an open-ended authorization for modes of proof other than the necessarily strict proof procedures of §1.453-2(d).

Therefore, it is apparent that the trustee can furnish no proof that coupon plan sales qualify for installment method treatment. Grant did not maintain records of customer coupon redemptions, and such records of sales are necessary to perform either sampling under §1.453-2(d), or a sale-by-sale analysis under §1.453-2(b)(2). Since those are the only modes of proof the Regulations permit, the trustee cannot prove that even a single sale under the coupon plan was contemplated to be and was in fact paid for in installments, i.e., that it constitutes a "sale on the installment plan."

Since that is so, we submit there is no need for this Court to reconsider its prior decision in this case. Whether or not the coupon plan is a "revolving credit plan," the Court's conclusion on the prior appeal that coupon plan sales must be subjected to the §1.453-2(d) requirements is correct, since that is the only mode of proof practicably available to high-volume retailers such as Grant. Hence, even assuming the Court's reference to the coupon plan as a revolving credit plan was inexact, that reference made no difference to the result the Court correctly reached on the first appeal. That result should be affirmed here.

ARGUMENT

THIS COURT CORRECTLY DECIDED ON THE PRIOR APPEAL THAT W. T. GRANT COMPANY IS NOT ENTITLED TO REPORT INCOME FROM SALES UNDER ITS COUPON BOOK CREDIT PLAN ON THE INSTALLMENT METHOD PRESCRIBED BY SECTION 453 OF THE INTERNAL REVENUE CODE

A. The background of the pertinent Section 453 Regulations

Section 453(a) of the Internal Revenue Code of 1954, Appendix, infra, provides that--

> Under regulations prescribed by the Secretary * * *, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

Though essentially equivalent provisions have appeared in all revenue statutes since the Revenue Act of 1926, c. 27, 44 Stat. 9, §212(d), neither the statutes nor the Treasury Regulations defined the meaning of sales "on the installment plan" prior to 1963. In 1960, however, the court in Consolidated Dry Goods Co. v. United States, 180 F. Supp. 878 (Mass.), was faced with deciding whether a revolving credit type plan constituted an "installment plan" within the meaning of Section 453(a) and its predecessor in the Internal Revenue Code of 1939. The court construed the statutory term "installment plan" in accordance with its ordinary and commercial usage, and concluded that the revolving credit type plan before it constituted such an "installment plan." As a result, the taxpayer was permitted to report all of its sales under the plan on the installment method.

The Commissioner of Internal Revenue was dissatisfied with this result. See Rev. Rul. 60-293, 1960-2 Cum. Bull. 163. A fundamental prerequisite for reporting gain from a sale on the installment method is that the sale be paid for in "installments," i.e., in two or more payments. Baltimore Baseball Club, Inc. v. United States, 481 F. 2d 1283 (Ct. Cl., 1973). Under revolving credit type plans, a customer may charge merchandise of any price to his accounts, and ordinarily he has the option of paying the outstanding balance of his account within a short time after the close of a billing period to avoid payment of finance charges. Moreover, a customer's payment is not applied to liquidate any particular sale, but to reduce the outstanding balance of his account.

Thus, the holding in Consolidated Dry Goods that the installment method could be used for all sales under a revolving credit type plan could permit tax deferral for two types of sales not within the intendment of Section 453(a): (1) sales of items having prices less than the minimum required installment payment under the plan, and (2) sales of items of any price to customers who used the credit plan as an ordinary charge account--who elected to pay the full balance of their accounts shortly after the billing period of sale to avoid finance charges. It could not have been

contemplated that sales of the first type would be paid for in installments, and though it may have been contemplated that multiple payments would be made for sales of the second type, such sales were in fact paid for in a single payment. 9/

As a result, the Commissioner issued proposed amendments to the Section 453 Regulations in 1962 (27 Fed. Reg., Part 10, p. 9920. et seq.), which were promulgated in final form in 1963. T.D. 6682, 1963-2 Cum. Bull. 197. The amendments were intended in part to define those sales under credit plans for which dealers were entitled to installment method treatment. That is, to correct the Consolidated Dry Goods focus on the qualities of installment plans rather than on the attributes of sales transacted under such plans, the Regulations prescribed definitions of "sale[s] on the installment plan" which were properly reportable under Section 453. §1.453-2(b)(1), (2), Appendix, infra. The Regulations provide that--

> The term "sale on the installment plan" means--
>
> (1) A sale of personal property by the taxpayer under any plan for the sale or other disposition of personal property, which plan, by its terms and conditions, contemplates that each sale under the plan will be paid for in two or more payments, or

9/ See generally, Raum, The Tax Aspects of Revolving Credit: Application of the Installment Method of Reporting Income, 19 N.Y.U. Institute on Federal Taxation 1225, 1229-1232 (1961); Emory, The Installment Method of Reporting Income: Its Election, Use, and Effect, 53 Cornell L. Rev. 181, 262-265 (1968); Wiese, Techniques of Installment Sales and Revolving Credit: Methods of Election; Bulk Sales of Receivables and Notes, 23 N.Y.U. Institute on Federal Taxation 905, 913-914 (1965).

> (2) A sale of personal property by the taxpayer under any plan for the sale or other disposition of personal property--
>
> (i) which plan, by its terms and conditions, contemplates that such sale will be paid for in two or more payments, and
>
> (ii) which sale is in fact paid for in two or more payments.

The first of these definitions (§1.453-2(b)(1)) refers to sales under traditional installment plans. And consistent with the concerns raised as to the holding in Consolidated Dry Goods, the second of the definitions (§1.453-2(b)(2)) applies to a sale under any plan (1) if the plan contemplates that that sale will be paid for in two or more payments, and (2) if the sale is in fact paid for in installments. See the authorities cited in fn. 9, p. 16, supra.

But merely to define the attributes which credit plan sales must possess for Section 453 purposes would have been an inadequate response. The Regulations' definitions are cast in the singular, and it would be extremely difficult, if not impossible, for retailers employing high-volume revolving credit type plans to apply the definitions on a literal basis, i.e., by examining each sale under a credit plan to determine whether it qualified as a "sale on the installment plan." The 1963 amendments therefore also provide rules whereby dealers can select a representative sample of customer accounts, analyze the year-end balances in those accounts to determine the percentage of sales possessing

the characteristics of a "sale on the installment plan,"[10/] and apply that percentage to total sales of personal property under the plan. See §1.453-2(d), Appendix, infra.

As this Court observed on the prior appeal (R. 47, 49-50), the Congress has explicitly approved these amendments to the Regulations. Early in 1964, Congress amended Section 453 of the Code to include revolving credit type plans--which the amendment defined broadly--within the statutory term "installment plan." Revenue Act of 1964, P.L. 88-272, 78 Stat. 19, §222. The legislative history underlying this amendment indicates that the Congress chose to replace the 1963 Regulations because it found them to be too complex. See S. Rep. No. 830, 88th Cong., 2d Sess., pp. 98-99 (1964-1 Cum. Bull. (Part 2) 505, 602-603). The Congress reversed itself later in 1964, however, by retroactively repealing its partial definition of the statutory term "installment plan." See §3 of the Act of August 31, 1964, P.L. 88-539, 78 Stat. 746. In doing so, Congress indicated that it preferred the Regulations' analytic focus on sales under installment plans over the emphasis on types of installment plans evidenced in its statutory solution to the problem. The relevant legislative history states (S. Rep.

10/ Consistent with the elements of the definition of "sale on the installment plan" in §1.453-2(b)(2), the principal tests in §1.453-2(d) seek to identify plan sales (1) that are of the type the terms and conditions of the plan contemplate will be paid for in installments, and (2) that are charged to accounts on which later payments indicate such sales are actually being paid for in installments. §1.453-2(d)(1), Appendix, infra; see generally, Wiese, Techniques of Installment Sales and Revolving Credit: Methods of Election; Bulk Sales of Receivables and Notes, 23 N.Y.U. Institute on Federal Taxation 905, 913-914 (1965).

No. 1242, 88th Cong., 2d Sess., pp. 4-5 (1964-2 Cum. Bull. 696, 699)) that "it would have been better to have left the Treasury Department with the opportunity to determine by regulation the extent to which sales under revolving credit type plans are to be treated as sales under installment plans."

B. The prior appeal

In its decision on the prior appeal, this Court observed that the installment method of reporting was enacted to relieve dealers of the hardship of having to pay tax on gain from deferred payment sales before sale proceeds were actually received. The Court concluded that it was therefore incumbent upon the dealer seeking to defer the reporting of income on the installment method to prove that gain from his sales would in fact be received in installments. And the Court perceived that the type of proof required to make this showing was the essential point of distinction between the two definitions of "sale on the installment plan" in §1.453-2(b).

The Court noted that the first of the definitions (that of traditional installment sales in §1.453-2(b)(1)) normally involves sales under plans in which a separate installment contract is executed for each item sold. As the Court observed, the dealer's receipt of gain in installments is then ordinarily presumed from the fact that the parties expressly contract for installment payments with respect to each item sold. But this presumption of multiple payments did not apply to sales under the coupon plan, since Grant did not execute a separate agreement for

each sale under the plan. Since it was also quite possible that there were sales under the plan which were covered by a single monthly installment payment, the Court held that coupon plan sales did not qualify as traditional installment sales under §1.453-2(b)(1): it was not contemplated that each sale under the plan would be paid for in two or more payments. (R. 47-50.)

The Court observed that the second definition (that of "non-traditional installment sales" in §1.453-2(b)(2)) referred to credit plans in which the contract between the parties covered a number of sales. Since the parties then express no intent as to each sale, proof of actual multiple payments must be shown. The Court concluded that the coupon plan fell within this category, and that it was possible that at least some sales under the plan had been paid for in single monthly payments. The Court concluded that the proof procedures in §1.453-2(d) were therefore applicable to sales under the coupon plan. Finding that Congress intended installment method treatment to be extended to "revolving credit plans, such as Grant's subject however to the regulation and proof requirements deemed warranted by the Commissioner" (R. 50), the Court held that Grant could not meet the requirements of §1.453-2(d), since it had failed to maintain customer records of coupon redemptions. (R. 46-51.)

The trustee contends that the prior decision turned on this reference to the coupon plan as a revolving credit plan. He argues that the characterization stems from the Court's mis-

concention that all "nontraditional plans" whose sales must satisfy the definition in §1.453-2(b)(2) constitute revolving credit plans. He suggests that that is not the case, and that only sales under revolving credit plans must satisfy the proof procedures of §1.453-2(d). As to other plans covered by §1.453-2(b)(2), the trustee suggests the Regulations permit any reasonable mode of proof which establishes the percentage of plan sales that were paid for in installments. And he contends that the coupon plan is one such other plan. He therefore contends that this Court should reconsider and revise the law of its prior decision, and that it should remand the case to the Tax Court in order that he may prove that the coupon plan is not a revolving credit plan and that a percentage of plan sales qualify for installment method treatment. The trustee argues that manifest injustice will otherwise result.

It is indisputable that this Court has the power to reconsider its prior determinations in this case. But it is equally clear that it is the practice of appellate courts not to reconsider "the law of the case," in order to bring an end to litigation and to economize judicial efforts. Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F. 2d 944, 952-953 (C.A. 2, 1964), cert. denied, 377 U.S. 934 (1964); White v. Higgins, 116 F. 2d 312, 317-318 (C.A. 1, 1940); see United States v. Fernandez, 506 F. 2d 1200, 1203-1205 (C.A. 2, 1974). The

on such data--indeed, based on any data short of records of

power to reopen legal determinations is exercised only in exceptional circumstances--where there has been no intervening change of law or fact, "only in a clear instance of previous error, to prevent a manifest injustice." White v. Higgins, supra, p. 317; White v. Murtha, 377 F. 2d 428, 431-432 (C.A. 5, 1967). And as this Court has held, mere doubt as to the correctness of a prior determination is not enough to reopen the matter for full reconsideration. Zdanok v. Glidden Company, Durkee Famous Foods Division, supra; accord, White v. Higgins, supra.

We shall demonstrate presently, however, that this Court's reference to the coupon plan as a "revolving credit plan" does not seem to have been crucial to the decision of the prior appeal. The crucial aspect of the Court's decision was its legal determination that the Regulations required Grant to furnish proof of the extent to which sales under the coupon plan were actually paid for in two or more installments. The proof procedures prescribed by §1.453-2(d) are the only practicable mode of proof the Regulations make available in such circumstances, whether the "nontraditional" plan is a "revolving credit plan" or not. Since Grant failed to maintain the records of coupon sales necessary to perform the analysis of customer accounts required by §1.453-2(d), the Court properly concluded that Grant could not report income from coupon plan sales on the installment method. Hence, even assuming that the Court might

have been inexact in referring to the coupon plan as a revolving credit plan, the Court's holding that Grant was required to furnish the proof contemplated by §1.453-2(d), and that it could not do so, was clearly correct. There is therefore no need for the Court to reconsider its law of the case. But even should the Court do so (compare Petition of United States Steel Corp., 479 F. 2d 489, 493-494 (C.A. 6, 1973), cert. denied sub nom. Fuhrman v. United States Steel Corp., 414 U.S. 859 (1973)), no change in result should be reached. 11/

11/ We believe the Court's determinations on the prior appeal necessarily include a rejection of the trustee's argument, and indeed, the trustee does not appear seriously to suggest otherwise. (Compare Br. 67, fn. 65.) Alternatively, however, if the Court is persuaded that the trustee's argument constitutes a contention not heretofore raised, and therefore that is not encompassed by its law of the case, we submit that the argument is untimely raised. The argument involves a factual inquiry as yet unconsidered by the Tax Court (i.e., whether the coupon plan is a revolving credit plan under §1.453-2(d)(1) of the Regulations), and no reason appears why the argument could not have been raised in the first hearing before the Tax Court, or at least on the prior appeal. See Dall v. Commissioner, 228 F. 2d 526 (C.A. 2, 1955). Contrary to the trustee's contentions (Br. 50-53, 69), the occurrence of Grant's bankruptcy and the substantial tax liabilities that are involved here and in the bankruptcy do not amount to the exceptional circumstances necessary to permit a new theory to be raised at this late date. Cf. Hormel v. Helvering, 312 U.S. 552 (1941). As we intimate infra, p. 39, fn. 26, Grant faced the risk of substantial deficiencies for later taxable years as soon as the Commissioner commenced the prior appeal. Moreover, counsel for Grant on the prior appeal did raise a new theory on petition for rehearing (compare Petition for Rehearing in Banc (sic), C.A. 2 - No. 72-2213, pp. 6-8, 13-14), which this Court denied. We submit there is no warrant for litigating yet another theory for Section 453 treatment this late in the day. Cf. Ketler v. Commissioner, 196 F. 2d 822, 826-827 (C.A. 7, 1952); Zdanok v. Glidden Company, Durkee Famous Foods Division, supra, pp. 952-953.

C. The trustee's contentions concerning the modes of proof the Regulations permit for nontraditional installment sales are without merit

The trustee initiates his challenge to the Court's prior decision by comparing the variety of installment sale plans encompassed by the definition in §1.453-2(b)(2) ("¶2(b)(2)") with that covered by the proof rules contained in §1.453-2(d) ("¶2(d)"). The trustee acknowledges that both these provisions were added to the Regulations as a direct result of Consolidated Dry Goods, which dealt with a revolving credit type plan. Yet he contends that ¶2(b)(2) was intended to encompass not only revolving type plans, but other "nontraditional" installment plans as well. By contrast, according to the trustee, the detailed proof procedures set forth in ¶2(d) apply exclusively to "revolving credit plan[s]" described in §1.453-2(d)(1) ("¶2(d)(1)"). As to other nontraditional plans, Regulations §1.453-2(c) allows the necessary showing of multiple payment sales to be made by any reasonable means permitting "accurate computation."

The trustee acknowledges the correctness of the Court's conclusion that sales under the coupon plan must satisfy the terms of ¶2(b)(2). But he contends the Court erred in assuming (1) that ¶2(b)(2) deems all credit plans that are not traditional installment plans to be revolving credit plans, and (2) that sales under all nontraditional plans must therefore satisfy the procedures of ¶2(d) to be treated as "sale[s] on the installment plan" within ¶2(b)(2). He contends these assumptions were determinative of the prior appeal, since the Court referred to the coupon plan as a revolving credit plan and concluded that sales under the plan must be subjected to the proof procedures

of ¶2(d). The trustee argues that the coupon plan is not a revolving credit plan as defined in ¶2(d)(1), and that coupon plan sales need not be analyzed as required in ¶2(d), but that they may be shown to satisfy the terms of ¶2(b)(2) by any "reasonable method" of statistical proof establishing which sales were paid for in two or more payments. And the trustee asserts that he is prepared to employ such statistical proofs in the Tax Court to establish, by "accurate computation," the portion of qualifving coupon plan sales.

We believe it is unnecessary to engage in argument concerning the preliminary points of the case the trustee advances.[12/] Thus, we will concede, for purposes of argument, that ¶2(b)(2) may encompass nontraditional installment plans that are not revolving credit plans as defined in ¶2(d)(1). Although we disagree with much of the reasoning the trustee suggests as support for that proposition,[13/] we agree that the language of ¶2(b)(2)

12/ As the discussion under part A of our brief indicates, however, the trustee's assumption that ¶2(b)(2) requires a showing only that sales were in fact paid for in installments is incorrect. (See, e.g., Br. 30, 49-50; compare Br. 25-26.) The definition of ¶2(b)(2) requires two elements for each qualifying sale: (1) that the plan's payment provisions indicate the sale is of the type that will be paid for in installments, and (2) that an after-the-fact examination indicates the sale is in fact being paid for in installments. See Wiese, Techniques of Installment Sales and Revolving Credit: Methods of Election; Bulk Sales of Receivables and Notes, 23 N.Y.U. Institute on Federal Taxation, 905, 914-915 (1965). As our earlier discussion demonstrates, both ¶2(b)(2) elements must be met to assure that dealer sales come within the intended scope of Section 453, i.e., that they represent sales paid for in installments.

13/ For example, we dispute the trustee's assertion that ¶2(b)(2) was added to the Regulations before promulgation in final form in 1963 simply to "fill the gap" between traditional installment plans and revolving credit plans in the Regulations proposed in 1962. We likewise disagree that this addition of ¶2(b)(2) was the only major revision made to the proposed Regulations. (Br. 16.) The public record does not support these assertions, and indeed it suggests they are quite inaccurate. Retailers were

is not expressly restricted to sales under credit plans which are revolving credit plans as defined in ¶2(d)(1).[14] Hence, for purposes of argument here, we are willing to agree that sales under a nontraditional installment plan could be reported on the installment method, if they are shown to satisfy the attributes of the ¶2(b)(2) definition of "sale on the installment plan" and other applicable legal requirements, without regard for whether the plan under which the sales occur is regarded as a ¶2(d)(1) "revolving credit plan."

Moreover, we are also willing to agree for the sake of argument that Grant's coupon plan is not a "revolving credit plan" as that term is defined in ¶2(d)(1).[15] But neither of these con-

13/ (continued)
greatly concerned with the proof procedures in §1.453-2(d) of the proposed Regulations, and succeeded in persuading the Treasury to modify the so-called "small sale rule" of §1.453-2(d)(3)(i) very substantially. See Wiese, Techniques of Installment Sales and Revolving Credit: Methods of Election; Bulk Sales of Receivables and Notes, 23 N.Y.U. Institute on Federal Taxation, 905, 914-915 (1965).

14/ On the other hand, we shall demonstrate, infra, that the proof rules in ¶2(d)(2) and (3) are sufficiently flexible to be applied by dealers using nontraditional plans other than revolving credit plans under the trustee's interpretation of ¶2(d)(1). This suggests that the 1963 amendments to the Regulations were intended to provide installment method treatment on the basis of deferred-payment characteristics possessed by specific sales under nontraditional plans, and not on the basis of the qualities of the plan itself.

15/ This concession, however, is not intended to evidence acquiescence in the trustee's analysis of ¶2(d)(1) (Br. 45-50), since we believe analysis of that provision is unnecessary to determination of this case. And we distinctly disagree with the trustee's argument that the coupon plan is not a revolving credit plan because it allegedly is difficult to apply the proof rules of ¶2(d) to sales under the plan. (Br. 49-50.) As we shall demonstrate shortly, those rules are well suited and indeed necessary to Section 453 analysis of coupon plan sales.

cessions should affect the outcome of this appeal, because the trustee's emphasis on the types of credit plans which fall either within ¶2(b)(2) or ¶2(d)(1) obfuscates the single determinative issue in this case, i.e., what type of proof is required to establish coupon plan sales as "sale[s] on the installment plan" within ¶2(b)(2). As our concessions themselves indicate, this case does not turn on the qualities of the coupon plan qua plan, but on whether the trustee is able to furnish the requisite proof that sales under the plan meet the regulatory elements of "sale[s] on the installment plan." It is on that point that the trustee's case founders, and on which this Court's prior decision is correct.

The trustee contends that the proof rules in ¶2(d)(2) and (3) apply exclusively to revolving credit plans defined in ¶2(d)(1). (Br. 30-34.) He suggests that the ¶2(d) proof rules were designed solely to deal with assertedly unique features of revolving credit plans--specifically, the fact that such plans involve periodic fluctuations in account balances as a result of new charges or credits. (Br. 31, 49.) Accordingly, he contends, the ¶2(d) rules may not be adaptable to other nontraditional plans, or that, if adaptable, they may be unnecessarily burdensome. (Br. 31-32, 49-50.) He thus concludes that dealers using such other nontraditional plans need not perform the analysis of accounts required by ¶2(d), and that §1.453-2(c)(1) of the Regulations, Appendix, infra, permits them to use any reasonable method to prove that a percentage of plan sales satisfies ¶2(b)(2). (Br. 33, 43-44, 49-50.)

We submit, however, that the trustee has misread the Regulations, and that the contentions he forwards amount to little more than a petition to this Court to relax the strict tenor of the Regulations, a tenor they must have if Section 453 treatment is to be limited to sales having the deferred payment characteristics the statute was intended to deal with. At all events, it has long been established that Grant failed to maintain customer records of sales under the coupon plan, and it is therefore demonstrable that the trustee cannot prove even a single sale under the plan satisfies the elements required of a "sale on the installment plan" under ¶2(b)(2).

First, an examination of the rules in ¶2(d)(2) and (3) demonstrates that those rules are suitable and appropriate for application to plans in addition to those meeting the ¶2(b)(1) definition of revolving plans. The procedure required by ¶2(d) consists of selecting a sample of customer accounts and examining the year-end balances in those accounts.[16/] The examination determines the extent to which sales reflected in the account balances are (1) of the type which the terms and conditions of the credit plan contemplate will be paid for in installments (¶2(d)(3)(i)), and (2) are charged to accounts on which sub-

16/ The standards in ¶2(d)(2) concerning the selection of a proper sample of customer accounts are amplified by Rev. Proc. 64-4, 1964-1 Cum. Bull. (Part 1) 644, and Rev. Proc. 65-5, 1965-1 Cum. Bull. 720.

sequent payments indicate that the sales are in fact being paid for in installments (¶2(d)(3)(ii)).[17/]

As earlier discussed, these rules were designed, in part at least, to isolate those sales under revolving credit type plans which do not appear to possess the characteristics of installment payments necessary for Section 453 treatment. But it can be shown readily that at least some sales under the coupon plan are likely to suffer the same fatal defects for Section 453 purposes. And even under our assumption that the coupon plan is not a ¶2(d)(1) revolving credit plan, it is likewise apparent that the ¶2(d) rules are aptly suited to identifying such ineligible, one-payment sales.

Coupons could be used to purchase any merchandise in Grant's stores, and many coupons had nominal redemption values (see Ex. 6-F). Thus, it is possible that some sales under the plan consisted of merchandise priced at amounts less than the monthly payments customers were required to make on coupon books, i.e., there may well have been sales which the plan did not contemplate would be paid for in installment payments. (See ¶2(b)(2)(i)). Similarly, a customer might purchase a coupon book during the last month of Grant's taxable year, redeem his coupons immediately for higher-priced items, and prepay all installments due for the

17/ After certain other adjustments, the percentage of sales meeting both tests is then applied to total sales of personal property under the plan. See generally, Emory, The Installment Method of Reporting Income: Its Election, Use and Effect, 53 Cornell L. Rev. 181, 264, fn. 327 (1968); Wiese, Techniques of Installment Sales and Revolving Credit: Methods of Election; Bulk Sales of Receivables and Notes, 23 N.Y.U. Institute on Federal Taxation 905, 914-918 (1965).

coupon book on the first installment payment date in order to minimize the predetermined finance charge. (R. 10-11, 46.) Thus, it is also possible that some sales under the plan were of the type which the plan contemplated would be paid in installments, but which were in fact paid for in single payments. (See ¶2(b)(2)(i), (ii).) If the trustee had available the records of customer redemptions from which a sample of account balances could be selected and analyzed under ¶2(d)(2) and (3), he would determine that sales in the former category (at prices less than the monthly payment) failed the test set forth in ¶2(d)(3)(i), 18/ and that those in the latter category (sales paid for in a single payment) failed the test in ¶2(d)(3)(ii).

Hence, the trustee errs in asserting that the proof rules in ¶2(d) are suited only to the features of the nontraditional plans he finds to be revolving credit plans within ¶2(d)(1). Indeed, since there may be sales under the coupon plan which are not entitled to Section 453 relief for the same reasons that casue the ineligibility of sales under typical revolving credit plans, it would be anomalous if coupon plan sales were to qualify for installment treatment on any lesser showing than that required for revolving credit sales. Yet, since Grant maintained no actual sales records under the coupon plan, such a lesser showing is necessarily what the trustee seeks permission to make here.

18/ In actuality, the "small sale rule" in ¶2(d)(3)(i) is applied to the aggregate of sales occurring in a single month. For the sake of simplicity, we apply the rule as though it tested each sale, not each month's sales.

Moreover, the truscee's contention that the ¶2(d) rules do not "fit" the coupon plan (Br. 49-50) is accurate only if the situation is viewed from hindsight. The ¶2(d) rules were in existence in the years here in issue, [19] and they cannot now be utilized simply because Grant failed to maintain identifiable records of customer coupon redemptions. Similarly, it is academic to speculate that there may be nontraditional plans to which the ¶2(d) rules could not be applied. (Br. 31-32.) Those rules could have been applied to qualify coupon plan sales if sales records had been kept, and whether there may be other nontraditional plans for which that may not be so is thus of small moment in this case.[20]

19/ Amendments to the Regulations were promulgated in final form in October, 1963 (T.D. 6682, 1963-2 Cum. Bull. 197), well after the commencement of the first of Grant's taxable years involved here (R. 7). However, the proposed Regulations were issued in 1962 (27 Fed. Reg., Part 10, p. 9920), before that first year had begun, and the sampling of account balances prescribed in the proposed Regulations required maintenance of sales records for each credit plan customer, just as the final Regulations do. (See §1.453-2(d) of the proposed Regulations, id.)

20/ It may be true that the ¶2(d) rules cannot be used to qualify any sales under the trustee's hypothetical "Unitary Credit Plan" (Br. 28-30, 31-32), since that plan requires customers to pay account balances upon receipt of a single billing statement. (Compare the "payment test" of ¶2(d)(3)(ii).) Even if that is so, however, it should also be recognized that the hypothetical plan is a nontraditional plan of the most limited nature. Contrary to the trustee's assertions (Br. 32, fn. 36), only one sale to each Plan customer is contemplated to and will in fact be paid for in two payments, viz., the first sale which surpasses a customer's $50 deposit. All other sales will be liquidated either by the single payment $50 deposit, or by the single payment the customer makes after the Plan's expiration if his purchases exceed the deposit. And since there can be only one such qualifying sale to each Plan customer, the hypothetical dealer would have proof with which he could literally satisfy the terms of ¶2(b)(2) if he recorded all sales to each customer until and including the first sale which exceeds the $50 deposit.

The trustee argues, though, that it would have been "extremely burdensome" for Grant to have maintained such records, since they would have had no business value. (Br. 49-50.) Indeed, the trustee contends that if any dealer using a nontraditional plan which is not a revolving credit plan can satisfy the requirements of ¶2(b)(2) without utilizing the stringent ¶2(d) rules, compliance with the ¶2(d) rules should not be required. (Br. 32.)

But this argument flies in the face of the narrow role Section 453 plays in tax accounting. It has been held uniformly that the installment method constitutes an exception to the general rules of tax accounting. Section 453 therefore must be strictly construed against taxpayers, and its benefits made available only to those literally within its terms. Baltimore Baseball Club, Inc. v. United States, 481 F. 2d 1283, 1285-1286 (Ct. Cl., 1973); Cappel House Furnishing Co. v. United States, 244 F. 2d 525 (C.A. 6 1957); Blum's, Inc. v. Commissioner, 17 B.T.A. 386, 389 (1929). And as this Court observed on the prior appeal (R. 48-49), the instant Regulations received express Congressional approval in 1964. Thus, the respect courts customarily accord Treasury Regulations (see United States v. Correll, 389 U.S. 299, 306-307 (1967)) is especially warranted in this instance, and the suggestion that this Court should dispense with the strict proof requirements of ¶2(d) simply cannot be maintained.

In short, irrespective of the merit of the trustee's arguments concerning the types of plans contemplated by ¶2(b)(2) and 2(d)(1), the Regulations at most permit two modes of proof which can be used to establish that sales under nontraditional plans

qualify as "sale[s] on the installment plan" within ¶2(b)(2). A dealer may use the sampling procedure authorized in ¶2(d), or he may literally satisfy the terms of ¶2(b)(2) by establishing as to each sale that the "(i) * * * plan, by its terms and conditions, contemplates * * * such sale will be paid for in two or more payments, and (ii) * * * [that the] sale is in fact paid for in two or more payments" ((¶2(b)(2)).[21/]

While the trustee argues that the last sentence of §1.453-2(c)(1) ("¶2(c)(1)")[22/] permits dealers using nontraditional plans that are not revolving credit plans to employ any reasonable statistical mode of proof to qualify such sales (Br. 33, 43-44, 49-50), the contention is devoid of merit. As is implicit in this Court's prior decision (R. 51), this portion of ¶2(c)(1) is simply a record retention requirement. It does not rise to the level of an independent source of authority permitting dealers

21/ Moreover, Rev. Rul. 71-595, 1971-2 Cum. Bull. 223, on which the trustee relies (Br. 34-35), is not at odds with our interpretation of the modes of proof the Regulations permit in this case. The ruling actually has no relevance to the question of proof, since the sole issue it addresses is whether sales under the taxpayer's deferred multiple payment plan might be eligible for Section 453 treatment. Thus, the ruling does not discuss whether the taxpayer in the ruling qualified a portion of his sales under ¶2(b)(2) by means of the sampling procedures of ¶2(d), or by satisfying the terms of ¶2(b)(2) on a sale-by-sale basis, showing that each sale was contemplated to be and was in fact paid for in installments. Indeed, the only published position the Commissioner has taken on the issue of mode of proof is to be found in Rev. Rul. 74-442, 1974-2 Cum. Bull. 152, in which he explicitly adopted the holding of this Court's prior decision in this case.

22/ That portion of §1.453-2(c)(1) provides that--

> A dealer who desires to compute income by the installment method shall maintain accounting records in such a manner as to enable an accurate computation to be made by such method in accordance with the provisions of this section, section 446, and §1.446-1.

using nontraditional plans to utilize any mode of proof. By its own terms, the provision is not restricted to dealers using nontraditional plans, but requires the retention of adequate records in the use of any installment plan. Furthermore, this provision of ¶2(c)(1) had been part of the dealer installment sale regulations long before the 1963 amendments first dealt with nontraditional installment plans (see Treasury Regulations 74, Art. 351 (1928 Revenue Act)), yet nothing suggests that the provision assumed the open-ended significance the trustee attaches to it when the Regulations were amended in 1963.[23/]

It is therefore apparent that the trustee can make no showing which will qualify coupon plan sales for installment method treatment. It is undisputed that Grant did not maintain records of coupon redemptions that are identifiable by customer (R. 11, 46), and such records are required to establish qualifying sales on the basis of either the sampling authorized by ¶2(d) or the sale-by-sale analysis literally permitted by ¶2(b)(2). Since those are the only modes of proof the Regulations permit for nontraditional installment sales, the trustee must fail. Simply put, he cannot prove that a single sale under the coupon plan was contemplated to be and was in fact paid for in installments, i.e.,

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23/ The trustee argues that the fact that ¶2(d) requires sampling for revolving credit plans confirms that dealers using other nontraditional plans may qualify for Section 453 treatment by offering statistical proofs which satisfy "¶2(c) accurate computation" requirements. (Br. 33, fn. 38.) But this argument turns the actual relationship between ¶2(c) and 2(d) on its head. For dealers using revolving plans, ¶2(c) requires only that adequate records of sales be kept so that the ¶2(d) sampling can be performed. Here, the trustee in effect seeks to elevate ¶2(c) over ¶2(d) by developing a percentage of qualifying sales without any underlying records of customer sales.

that it constitutes a "sale on the installment plan" under ¶2(b)(2).

Indeed, an examination of the alleged evidence the trustee proposes to present makes this conclusion virtually undeniable. The trustee's brief indicates (pp. 49-50, fn. 52) that he would rely to a substantial degree on the same alleged data concerning the rate of coupon redemptions that Grant sought to present to the Tax Court on remand. (Compare R. 56, 59; July 31, 1974 Tax Court Tr. 6, 9-10, 21.) The data consists of statistical samplings taken by Grant's accountants, which allegedly demonstrates that more than 80 percent of all coupons were redeemed for merchandise within 30 days after issuance of the underlying coupon books. In the Tax Court, Grant argued that at least these redemptions represented sales paid for in two or more payments, since a minimum of four installment payments was required for the purchase of coupon books, and the first such payment was due within 30 days after the book was purchased. (Id.)

While this data may tend to suggest that at least some sales under the coupon plan might possess the attributes of "sale[s] on the installment plan" under ¶2(b)(2), it is equally plain that the data itself cannot be used to prove such qualification as to any portion of coupon sales. The data does not permit identification either of small sales, which would not be contemplated to be paid for in installments under the coupon plan (see ¶2(b)(2)(i)), or sales which would be contemplated to be paid for in installments under the plan, but which were in fact paid for in a single payment (see ¶2(b)(2)(i), (ii)). See pp. 28-30, supra. The development of a percentage of multiple payment sales based

on such data--indeed, based on any data short of records of actual sales--would thus amount to pure guesswork, and cannot be reconciled with the necessarily strict tenor of the Regulations.[24/]

In sum, the trustee's arguments concerning modes of proof effectively require this Court to revise, if not rewrite, the Regulations--Regulations which, it should be emphasized, are legislative in nature. The Regulations permit only two modes of proof for nontraditional installment plan sales--the sampling permitted by ¶2(d), or compliance with ¶2(b)(2) as to each sale--whether or not the plan itself constitutes a revolving credit plan. The trustee cannot satisfy either of these modes, and therefore asks this Court to endorse ad hoc proofs tailored to the needs of dealers' individualized plans. But the realization that Grant could have maintained the records required by ¶2(d), and that in the absence of such records the trustee has no real proof at all, serves only to reaffirm the conclusion this Court earlier reached that Grant "cannot prove that it is eligible for §453 relief" (R. 51).

24/ In this connection, it should be noted that the dissent in the initial Tax Court proceeding erroneously concluded that only sales occurring in the last month of Grant's taxable year should be disqualified from Section 453 treatment. (R. 39-40.) The dissent concluded that the absence of proof of multiple payments for sales in the final month served to disqualify such sales, but we have shown that the same lack of proof necessarily disqualifies all sales occurring throughout the taxable year. In concluding that sales in the first eleven months of the year should be given installment treatment, the dissent merely assumed that all of those sales would have been paid for in installments. No such assumption can be squared with the Regulations, nor, indeed, with the intended scope of Section 453. See pp. 14-19, supra. Presumably, this Court's observation that "some * * * purchases in the last month of the tax year are covered by a single month's payment" (R. 50) was derived from the conclusions of the Tax Court dissent. In any event, the trustee is unable to prove that tax deferral is proper as to sales that occurred at any time during the taxable year.

For these reasons, we believe the Court's prior decision in this case is correct. Moreover, we believe the trustee's seizing upon the Court's reference to the coupon plan as a revolving credit plan is quite mistaken. We believe that the Court's prior decision demonstrates its recognition that, in terms of the types of proof the Regulations permit, the Regulations do indeed contemplate "only two categories" (Br. 40) of installment plans. Thus, the Court correctly determined that the critical difference between the definitions in ¶2(b)(1) (that of traditional installment sales) and ¶2(b)(2) (that of "nontraditional" installment sales) concerns the nature of the proof a dealer must furnish to establish his credit sales as "sale[s] on the installment plan." The Court further observed that the proof the ¶2(b)(2) definition requires is proof that sales were paid for in multiple payments, and as a practical matter, the Regulations permit only one method by which such proof can be furnished--the sampling procedures of ¶2(d). While we have conceded here that a second mode of proof might consist of a sale-by-sale showing of those sales which satisfy the terms of ¶2(b)(2), that method obviously is not feasible for high-volume retailers such as Grant.

Viewed in this light, it is not inaccurate to refer to the coupon plan as a "revolving credit plan." The only practicable mode of proof the Regulations permit for sales under the coupon plan is that set forth in ¶2(d), and that provision appears under

such a label. Given the fact that the concerns which gave rise to the 1963 amendments to the Regulations did not relate to types of nontraditional plans, but to the characteristics of particular sales transacted under them, the language of the Regulations is not directed to detailing definitions of the types of such plans. Hence, we view the Court's reference as quite understandable.[25/]

In any event, the characterization ultimately is insignificant. We submit that even if it is assumed that the coupon plan is not a revolving credit plan, the only practicable mode of proof permitted by the Regulations is that set forth in ¶2(d). Hence, even if this Court were to conclude that its characterization of the coupon plan was erroneous, that portion of the Court's prior opinion was not determinative. What was determinative was the Court's conclusion that Grant was required to furnish proof of its qualifying sales, and that it could not do so in accordance with the Regulations' requirements. We submit that that determination is correct.

25/ Moreover, we dispute the trustee's representation (Br. 38 et seq.) that the Commissioner's briefs on the prior appeal claimed the coupon plan to be a revolving credit plan. The Commissioner's opening brief stated several times that the coupon plan was merely "analogous" to a revolving credit plan; indeed, Grant's answering brief so characterized the Commissioner's arguments (see p. 17 of Brief for Appellee, C.A. 2 - No. 72-2213). In fact, the Commissioner conceded in his reply brief (p. 4) that the coupon plan differed from a typical revolving plan in some respects. Of course, this presents an additional reason why it is unlikely that the Court attached significance to its characterization of the coupon plan: neither party claimed it was a revolving credit plan, and neither developed any position concerning the closeness of the plan to the ¶2(d)(1) revolving plan definition.

Hence, we believe there is no need either for this Court or the Tax Court to reach the question whether ¶2(b)(2) encompasses nontraditional plans in addition to revolving credit plans, or the question whether the coupon plan constitutes a revolving credit plan as defined in ¶2(d)(1). And since resolution of those questions would not alter the outcome of this case, the Court need not reconsider its law of this case. Cf. Zdanok v. Glidden Company, Durkee Famous Foods Division, supra.[26/] In any event, we believe the result the Court reached in its prior decision should be affirmed.

26/ Although we do not suggest that no injustice would result were the prior decision seriously incorrect, it should be noted that the trustee exaggerates the effect of Grant's bankruptcy on the tax deficiencies arising from the coupon plan issue. The trustee asserts that were it not for the bankruptcy, a decision in the Commissioner's favor on the Section 453 question would result only in Grant's owing interest to the Government. (Br. 8-10.) The volume of Grant's coupon sales increased substantially in the years subsequent to those involved here, however (see Petition for Rehearing, C.A. 2 - No. 72-2213, p. 11), and Grant therefore would have faced substantial deficiencies for a number of taxable years even had it not become bankrupt. See generally, Emory, The Installment Method of Reporting Income: Its Election, Use and Effect, 53 Cornell L. Rev. 181, 263, fn. 322 (1968).

CONCLUSION

For the foregoing reasons, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,
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DECEMBER, 1976.

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing brief has been made on the below-named counsel for the appellant on this 3rd day of December, 1976, by handing four copies thereof to his agent, James Biase, who appeared at the Department of Justice, Washington, D.C., 20530, and requested the same:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 453. INSTALLMENT METHOD.

(a) [as amended by Sec. 3(a), Act of August 31, 1964, P.L. 88-539, 78 Stat. 746] Dealers in Personal Property.--

(1) In general.--Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(2) Total contract price.--For purposes of paragraph (1), the total contract price of all sales of personal property on the installment plan includes the amount of carrying charges or interest which is determined with respect to such sales and is added on the books of account of the seller to the established cash selling price of such property. This paragraph shall not apply with respect to sales of personal property under a revolving credit type plan or with respect to sales or other dispositions of property the income from which is, under subsection (b), returned on the basis and in the manner prescribed in paragraph (1).

* * *

Treasury Regulations on Income Tax (26 C.F.R.):

§1.453-1 Installment method of reporting income.

(a) In general. (1) Section 453 permits dealers in personal property, that is, persons who regularly sell or otherwise dispose of personal property on the installment plan, to elect to return the income from the sale of other disposition thereof on the installment method. To the extent provided in paragraph (d) of §1.453-2, sales under a revolving credit type plan will be treated as sales on the installment plan and the income from the sales so treated may be returned on the installment method. A dealer who makes sales of personal property under both a revolving credit plan and a traditional installment plan may elect to report only sales under the traditional installment plan on the installment method; or he may

elect to report only sales under the revolving credit plan on the installment method; or he may elect to report both sales under the revolving credit plan and the traditional installment plan on the installment method. A traditional installment plan usually has the following characteristics:

(i) The execution of a separate installment contract for each sale of personal property, and

(ii) The retention by the dealer of some type of security interest in such property.

* * *

§1.453-2 Special rules applicable to dealers in personal property.

(a) In general. A person who regularly sells personal property on the installment plan may adopt (but is not required to do so), one of the following four ways of protecting his interest in case of default by the purchaser:

(1) By an agreement that title is to remain in the vendor until the purchaser has completely performed his part of the transaction;

(2) By a form of contract in which title is conveyed to the purchaser immediately, but subject to a lien for the unpaid portion of the selling price;

(3) By a present transfer of title to the purchaser, who at the same time executes a reconveyance in the form of a chattel mortgage to the vendor; or

(4) By conveyance to a trustee pending performance of the contract and subject to its provisions.

(b) Definition of sale on the installment plan. The term "sale on the installment plan" means--

(1) A sale of personal property by the taxpayer under any plan for the sale or other disposition of personal property which plan, by its terms and conditions, contemplates that each sale under the plan will be paid for in two or more payments, or

(2) A sale of personal property by the taxpayer under any plan for the sale or other disposition of personal property--

(i) Which plan, by its terms and conditions, contemplates that such sale will be paid for in two or more payments, and

(ii) Which sale is in fact paid for in two or more payments.

Normally, a sale under a traditional installment plan (as described in paragraph (a)(1) of this section), meets the requirements of subparagraph (1) of this paragraph. See paragraph (d) of this section for the application of the requirements of subparagraph (2) of this paragraph to sales under revolving credit plans.

(c) Installment income of dealers in personal property.--(1) In general. The income from sales on the installment plan of a dealer, that is, a person regularly engaged in the sale of personal property on the installment plan, may be ascertained by treating as income that proportion of the total payments received in the taxable year from sales on the installment plan (such payments being allocated in the year against the sales of which they apply) which the gross profit realized or to be realized on the total sales on the installment plan made during each year bears to the total contract price of all such sales made during that respective year. However, if the dealer demonstrates to the satisfaction of the district director that income from sales on the installment plan is clearly reflected, the income from such sales may be ascertained by treating as income that proportion of the total payments received in the taxable year from sales on the installment plan (such payments being allocated to the year against the sales of which they apply) which either (i) the gross profit realized or to be realized on the total credit sales made during each year bears to the total contract price of all credit sales during that respective year, or (ii) the gross profit realized or to be realized on all sales made during each year bears to the total contract price of all sales made during that respective year. See, however, paragraph (d)(6)(vi) of this section for rules permitting, under certain circumstances, all sales under a revolving credit plan to be considered as having been made in the taxable year. A dealer who desires to compute income by the installment method shall maintain accounting records in such a manner as to enable an accurate computation to be made by such method in accordance with the provisions of this section, section 446, and §1.446-1.

* * *

(d) Revolving credit plans. (1) To the extent provided in this paragraph, sales under a revolving credit plan will be treated as sales on the installment plan. The term "revolving credit plan" includes cycle budget accounts, flexible budget accounts, continuous budget accounts, and other similar plans or arrangements for the sale of personal property under which the customer agrees to pay each billing-month (as defined in subparagraph (6)(iii) of this paragraph) a part of the outstanding balance of his account. Sales under a revolving credit plan do not constitute sales on the installment plan merely by reason of the fact that the total debt at the end of a billing-month is paid in installments. The terms and conditions of a revolving credit plan do not contemplate that each sale under the plan will be paid for in two or more payments and thus do not meet the requirements of paragraph (b)(1) of this section. In addition, since under a revolving credit plan payments are not generally applied to liquidate any particular sale, and since the terms and conditions of such plan contemplate that account balances may be paid in full or in installments, it is generally impossible to determine that a particular sale under a revolving credit plan is to be or is in fact paid for in installments so as to meet the requirements of paragraph (b)(2) of this section. However, subparagraphs (2) and (3) of this paragraph provide rules under which a certain percentage of charges under a revolving credit plan will be treated as sales on the installment plan. For purposes of arriving at this percentage, these rules, in general treat as sales on the installment plan those sales under a revolving credit plan (1) which are of the type which the terms and conditions of the plan contemplate will be paid for in two or more installments and (2) which are charged to accounts on which subsequent payments indicate that such sales are being paid for in two or more installments.

(2)(i) The percentage of charges under a revolving credit plan which will be treated as sales on the installment plan shall be computed by making an actual segregation of charges in a probability sample of the revolving credit accounts and by applying the rules contained in subparagraph (3) of this paragraph to determine what percentage of charges in the sample is to be treated as sales on the installment plan. (See subparagraph (5) of this paragraph for rules to be used if some of the sales under a revolving credit plan are nonpersonal property sales (as defined in subparagraph (6)(iv) of this paragraph).)

Such segregation shall be made of charges which make up the balances in the sample accounts as of the end of each customer's last billing-month ending within the taxable year. (See subparagraph (6)(v) of this paragraph for rules to be used in determining which charges make up the balance of an account.) However, in making such segregation, any account to which a sale is charged during the taxable year on which no payment is credited after the billing-month within which the sale is made (hereinafter called the "billing-month of sale") and on or before the end of the first billing-month ending in the taxpayer's next taxable year shall be disregarded and not taken into account in the determination of what percentage of charges in the sample is to be treated as sales on the installment plan. In order to obtain a probability sample, the accounts shall be selected in accordance with generally accepted probability sampling techniques. The appropriateness of the sampling technique and the accuracy and reliability of the results obtained must, if requested, be demonstrated to the satisfaction of the district director. If the district director is not satisfied that the taxpayer's sample is appropriate or that the results obtained are accurate and reliable, the taxpayer shall recompute his sample percentage or make appropriate adjustments to his original computations in a manner satisfactory to the district director. The taxpayer shall maintain records in sufficient detail to show the method of computing and applying the sample.

* * *

(3) For the purpose of determining the percentage described in subparagraph (2) of this paragraph, a charge under a revolving credit plan will be treated as a sale on the installment plan only if such charge is a sale (as defined in subparagraph (6)(i) of this paragraph) and meets the requirements contained in subdivision (i) and (ii) of this subparagraph.

(i) The sale must be of the type which the terms and conditions of the plan contemplate will be paid for in two or more installments. If the aggregate of sales charged during a billing-month to an account under a revolving credit plan exceeds the required monthly payment, then all sales during such billing-month shall be considered to be of the type which the terms and conditions of such plan contemplate will be paid for in two or more installments.

* * *

(ii) The sale must be charged to an account on which the first payment after the billing-month of sale indicates that the sale is being paid in installments. The first payment after the billing-month of sale indicates that the sale is being paid in installments if, and only if, such payment is an amount which is less than the balance of the account as of the close of the billing-month of sale.

* * *

(6) For purposes of this paragraph--

(i) The term "sales" includes sales of services, such as a charge for watch repair, as well as sales of property, but does not include finance or service charges.

(ii) The term "charges" includes sales of services and property as well as finance or service charges.

(iii) A billing-month is that period of time for which a periodic statement of charges and credits is rendered to a customer.

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